DOCUMENT RESUME

ED 218 741 EA 014 768

TITLE The Issue of Binding Arbitration in the Public Schools. Public Review of Educational Policy (PREP).
INSTITUTION Pennsylvania School Boards Association, Inc., Harrisburg.
PUB DATE Apr 82
NOTE 37p.

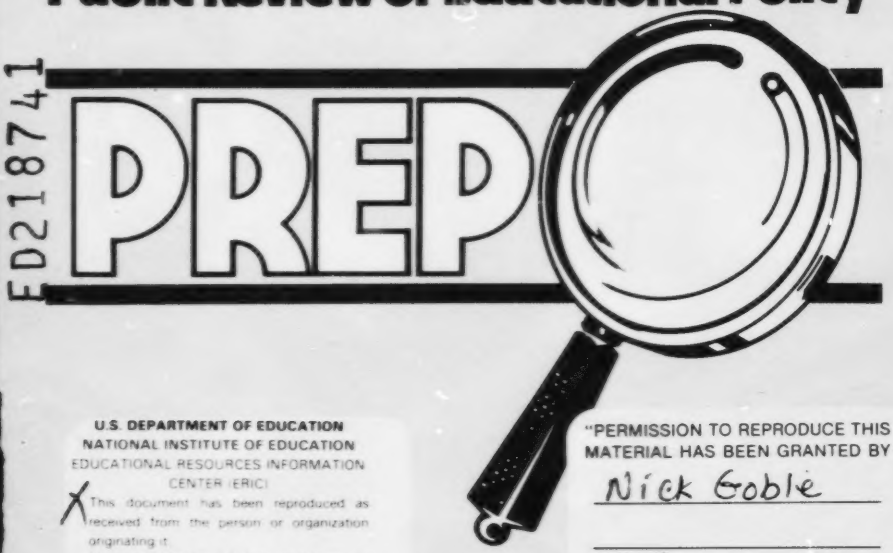
EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS *Arbitration; Collective Bargaining; Elementary Secondary Education; *Labor Legislation; Labor Problems; Labor Relations; Political Power; Power Structure; *Public Policy; Unions
IDENTIFIERS *Pennsylvania; *Politics of Education

ABSTRACT

Intended primarily for educators, legislators, and the general public in the state of Pennsylvania, this public affairs brochure addresses the question of whether binding arbitration should be legislated in that state as a means of resolving labor disputes between a local school district and its employees. The brochure reviews the history of arbitration, where it can be found today, and the evolution of labor legislation in Pennsylvania. Several arguments are advanced against the use of binding arbitration, claiming that an imbalance for the public interest would result. Also discussed are the constitutionality of arbitration, the fiscal ramifications of its adoption, and problems inherent in the arbitration process. (Author/WD)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

Public Review of Educational Policy



ED218741

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

X This document has been reproduced as received from the person or organization originating it.
Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official NIE position or policy.

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY

Nick Goble

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

The Issue of Binding Arbitration in the Public Schools

EA 014 768

PREP, Public Review of Educational Policy, researches and reviews selected topics of major importance to the continuing process of local control of public education. This public affairs brochure is available to the news media, public school officials and personnel, community service groups and the general public. No permission is necessary to reproduce the content of this publication except by appropriate credit to the Pennsylvania School Boards Association, Inc.

Produced and published by the Pennsylvania School Boards Association, 412 North Second Street, Harrisburg, PA 17101. Tel: (717) 233-1642. For further information, contact **Donald B. Owen,** PREP project manager; **Nick Goble,** director of public relations and production; or **Fred M. Heddinger,** executive director.

CONTENTS

THE QUESTIONS 1

SOME ANSWERS 2

DISCUSSION OF THE ISSUE 16

OTHER MAJOR TOPICS 19

CONCLUSION 32

THE QUESTIONS

Should binding arbitration be imposed upon governmental decision-making in Pennsylvania? What are the consequences if Pennsylvania should legislate binding arbitration as a method of resolving labor disputes between a local school district and its employes, presumably with the limited intent of avoiding prolonged labor impasse and strikes?

A careful review of the effects of such a process leads to several conclusions

Legislating any form of binding arbitration is not in the best interest of school officials and the general taxpaying public. Many of the consequences of binding arbitration are explained in some detail in the pages that follow. The main objections can be summarized as follows.

• Without a constitutional amendment, any legislation attempting to amend Act 195, the state's public employe bargaining law, and provide binding arbitration for teacher unions and other school employes would be unconstitutional.

Local school board directors lose authority to determine public policy

• Contrary to popular belief, binding arbitration is already a part of Act 195 when it comes to resolution of grievances that arise under a labor contract. Very often in private sector labor relations, unresolved grievances by a union lead to a strike. Under Act 195 public employers and their unions must use binding arbitration to resolve differences of opinion raised in the grievance about the intent, or application of a certain provision of a labor contract. This is sometimes called "rights arbitration" and has worked quite well, avoiding the kinds of strikes often encountered in private employment.

This is fundamentally different, however, in principle from allowing for binding arbitration to determine the substance of an agreement between a unit of government — a school board, for example — and a union. Having the very terms of the contract resolved in such a fashion is known as *"interest arbitration."* This review will address itself to interest arbitration, not rights arbitration.

• Local school board directors (and other elected local government officials) lose their authority to determine public policy, such as setting tax levels and establishing educational program policy under "interest arbitration."

• The arbitrator, who is not accountable in any way to the general public and who is not fiscally responsible to the local community, is entrusted with making decisions that can have a direct and

immediate effect of causing an increase in local tax rates and change in local services, regardless of whether or not the local taxpaying public is willing or capable of financing such increases.

• The arbitrator often makes decisions regarding administrative procedures which may have both economic and non-economic impact upon the local school district. The non-economic impact often results in public policy control being given to the special interest group involved in the bargaining process. This same concern applies equally to other units of government except police and fire personnel who are covered by a special circumstance that is discussed later.

Binding arbitration does not eliminate strikes

• Binding arbitration does not eliminate strikes. Historically, binding arbitration found a place in American labor law as a substitute for a strike in private sector negotiations where the two parties had mutually agreed upon the circumstances under which binding arbitration would be used. However, in cases where binding arbitration is a substitute for the strike weapon in public sector employment, strikes, albeit illegal ones, still occur. More often binding arbitration is sought, not as a substitute for the right to strike, but simply as an extension of the bargaining process for the union or the employer. More recently some public sector unions, especially the National Education Association (NEA), have sought arbitration **in addition to the right to strike,** thereby allowing the union to choose the more effective strategy in any given set of local circumstances.

Compulsory binding arbitration upsets the structures of American representative government

• Compulsory binding arbitration upsets the structures of American representative government. Arbitration in this sense — determining what the two parties, a unit of government and a union, shall agree to — is a public policy, or law-making function. The determination of public policy is a function of the legislative, and to some degree, the executive branches of government. The application of that policy, once determined, is a function of the judicial branch of government — the courts. Courts do not have the authority to exercise legislative powers — to make laws or to establish regulations. Arbitration is an extension of the judicial function of government.

Arbitrators are given powers that courts themselves do not and should not have

Thus, arbitrators, when given the power to order the conditions of a settlement between a unit of government and a union, are given powers that the courts themselves do not have and should not have.

• Compulsory arbitration has historically resulted in significantly high wages and fringe benefits for the union. This is caused by the natural inclination of an arbitrator to "split the difference" between what is offered and what is being sought. Even "last-best-offer" type of binding arbitration, where the arbitrator may not change the positions of the two parties and may only select one of those two positions, does not totally cure this "middle-of-the-road" approach.

A brief history of binding arbitration in the 20th century

In the United States, the World War I National Labor Board (NLB) was in existence for approximately one year. It had the ability to resolve any disputes that might have caused a strike or a production slowdown, to guarantee an uninterrupted flow of materials and munitions to Europe.

Although its guiding rule was the maintenance of the status quo in industrial relations, perhaps inadvertently, the NLB had the effect of encouraging unionism and collective bargaining. Through the NLB, the American Federation of Labor (AFL) won official government recognition on a par with employer associations and peaceful collective bargaining was encouraged. Under its benevolent control and the tight labor market of the era, union membership grew to a high of five million between 1920 and 1934.

The World War I NLB was able to settle all cases referred to it with the exception of three, which were referred to **President Wilson**, who as a means of enforcing the NLB's awards, either took over plants or threatened to draft workers and bar them from war jobs. In view of the national emergency, labor and management generally showed a patriotic willingness to abide by the NLB's awards.

In view of the national emergency, labor and management generally showed a patriotic willingness to abide by the NLB's awards

Of those three cases of defiance of the board of that period, two were cases of company defiance that resulted in government seizures. The third was a defiance strike which led to President Wilson's famous "work or fight" order. The workers returned to their jobs, rather than face military conscription.

Government seizure involved temporary government control of the business. Nationalization was not contemplated. In the absence of specific legislation, the legal basis for seizure rested in the wartime and emergency powers of the executive to prevent a breakdown of services essential to the community. In 1943 Congress passed the War Labor Disputes Act over **President Roosevelt's** veto. This law provided a statutory basis for seizure, but many wartime and post-war seizures were made under executive

emergency power without reference to the wartime law which expired by its own terms on June 30, 1947.

That union power and growth which was enhanced under the wartime arbitration system can hardly be disputed. Union membership rose from 8.7 million in 1940 to 14.3 million in 1945.

Union power and growth was enhanced under the wartime arbitration system

The strike record during World War II is mixed. The percentage of employes involved in strikes was low in 1942, but the other war years were about average for pre-war and post-war years, except for the abnormally high year of 1946. The point is clear, *even in wartime, strikes do occur under a compulsory arbitration system.*

The United States abandoned compulsory arbitration as an instrument of government policy at the close of hostilities in 1945, and instituted instead a series of intervening techniques, including fact-finding and seizure, which culminated in the national emergency procedures of the Taft-Hartley Act.

Binding arbitration has become a way of life in Australia, New Zealand and to a lesser extent in South Africa. India and some of the emerging nations have also adopted such a process.

Even in wartime, strikes do occur under a compulsory arbitration system

Compulsory arbitration in Australia, New Zealand and India, was adopted primarily as a means of supporting trade union growth and power. Certainly, other factors were present, particularly the desire to avoid industrial strife. But the basic support has come from legislators in other forms of government representing labor parties.

In New Zealand, for example, when the conservative party came to power in 1932, the compulsory feature of the law was set aside, only to be reinstituted a few years later when the labor party regained authority.

Who has binding arbitration today?

According to **Myron Lieberman's** recent book, *Public Sector Bargaining,* 30 states and six municipalities, three counties and Washington, D.C. have enacted some kind of binding interest arbitration statute. Eight date back to 1946-47 when as a reaction to a rash of strikes, strike control laws were passed, forbidding strikes but allowing for arbitration. For the most part these laws cover only police and/or firefighters, not teachers. But those numbers are decreasing.

Four states have declared binding arbitration unlawful

Recognizing that binding arbitration offends representative government and is poor public policy, four states have seen fit to declare it unlawful: California, Colorado, South Dakota and Utah.

An article in a March 1981 Bureau of National Affairs publication suggested increasing public awareness of the issue. "When voters are offered a clear choice in an initiative imposing compulsory arbitration as the procedure to settle contract disputes they will opt for the management choice and reject compulsory arbitration as they have recently in Phoenix, San Diego, Denver, Cincinnati and Massachusetts." In Massachusetts compulsory arbitration was not a concept being proposed for the first time. **A law permitting compulsory binding arbitration for police and for firefighters was repealed.**

An article in *The Wall Street Journal* (April 28, 1981) took note of the same trend. "To avoid strikes, about 18 states have state or local laws requiring an arbitrator to settle labor disputes with key public employes. But managers increasingly dislike such laws. Arbitrators don't consider the ability of the city to pay or the public interest, says a Milwaukee official; the city is challenging the laws constitutionality. A Michigan bill would suspend compulsory arbitration for public workers in big cities.

"Last November, voters in at least six areas

rejected or tossed out binding arbitration. The Massachusetts' law covering municipal police and firefighters had been on the books for a decade. In San Jose, California, voters approved such a measure after police and firefighter unions pushed it as a way to avoid strikes."

Voters in six areas rejected binding arbitration

D. S. Chauhan in a 1979 article entitled *"The Political and Legal Issues of Binding Arbitration in Government"* noted that the binding arbitration law then in effect in New York was up for extension or extinction in 1977 under sunset legislation passed in 1974. It caused considerable debate, including a reluctance on the part of **Governor Hugh Carey** to approve its extension, unless the statute was amended to permit the legislative body of the local government to have the power to reject the arbitration award.

It is of particular importance to note that as Pennsylvania wrestled with the problem of allowing collective bargaining for public sector employes in the middle and late sixties, police and firefighters were provided binding arbitration by Act 111 of 1968, but forbidden to strike.

Teachers (and other public employes) on the other hand, were given the right to strike, but no binding arbitration under Act 195 of 1970. Furthermore, it must be understood that in Pennsylvania before Act 111 could be passed, and before labor disputes between police officers and firefighters could be lawfully settled by binding arbitration, it was necessary for the general public to amend the Pennsylvania Constitution.

The question placed before the general public was: "Shall Article III, Section 31 of the Constitution be amended to authorize the General Assembly to enact laws providing that findings of panels selected for settlement of disputes between policemen and firemen and their public employers shall be binding and must be complied with by all parties?"

No such similar constitutional permit exists to allow Act 195 to be changed to provide binding arbitration for schools. Moreover, based upon the

experience of binding arbitration for police and firefighters under Act 111, it seems unlikely that voter approval would be given to such a proposal.

Labor law legislation in the Keystone State

Pennsylvania passed its first arbitration law in 1947. The law covered the utility industry and included a last-offer strike provision, i.e., under the Pennsylvania law, employes sent the case to arbitration by refusing the employer's last offer. In theory this was a tailor-made provision to encourage arbitration because it invited an arbitration award above the last offer made by management if rejected by the employes' union.

Under the 1947 anti-strike act school employes were forbidden to strike

The last offer strike vote provision was modeled on a provision of the Taft-Hartley Act and had similar results. Of the nine potential impasses between 1947 and 1952, eight resulted in rejection of company last offers. The ninth occurred just before the Korean War Wage Freeze went into effect and the employes feared that to reject it would deprive them of a wage increase throughout the emergency period.

Also in 1947 the Public Employes Anti-Strike Act was passed. Its major provisions were:

- School boards could discuss and confer with teachers' groups about conditions of employment.
- A school board, however, could not divest itself of its powers by a signed contract with employes, and could not delegate or abdicate its powers and duties.
- The school district was not required to, nor was it allowed to, recognize an exclusive bargaining agent or bargain collectively.
- School employes were forbidden to strike. If they did strike, it resulted in an automatic termination of their employment, their tenure, and their employment benefits. Their right to be rehired was also restricted to the extent that if rehired, there would be no raises for three years.

Because employe organizations attempted to stretch and mutilate the 1947 Act, it was the subject of much litigation. Two significant court cases firmly established the school boards' responsibility.

One such case was decided in the Common Pleas Court of Philadelphia whereby the court ruled that the district transfer pact with teachers was invalid.

The court stated, "The power vested in the school officials includes also the duty to constantly review and re-evaluate that policy. School officials must not be hampered or restrained at any time from acting in a contrary manner or from revising the stated policy when revision is dictated. The discharge of this function would be impeded by contractual agreements if we were to permit teacher assignments and transfer to be the subject of collective bargaining."

The court went on, "It is our view that it is a violation of the educational system and the public policy of this state to permit the transfer and assignment of teachers to be the subject of collective bargaining, and the 'Board' abused its discretion in allowing this subject to be part of the agreement."

The other case was decided in the Court of Common Pleas of Erie County. The conclusions of the law, as stated by the court were:

"(1) In the absence of an Act of the Legislature, exclusive collective bargaining between Defendant Union and the School District is illegal."

"(2) The school district may conduct non-binding negotiations over teachers' salaries with Plaintiff Union, Defendant Union, or both unions, or with any other interested parties."

The next significant piece of labor law in Pennsylvania was Act 111 of 1968, which gave firefighters and police collective bargaining with binding interest arbitration, but no right to strike. Then in 1970, teachers and other public employes were given collective bargaining rights under Act 195 without binding arbitration, but with a right to strike. Given an opportunity to examine the data involving the history of salary negotiations and pay raises between Act 111 and Act 195, it is understandable why **Lieutenant Governor Ernest Kline**, responsible for Pennsylvania's labor relations during the Shapp administration (1971-78), observed that "pay increases have been proportionately greater for police and firefighters under the 1968 Act with arbitration, than the 1970 Act for all other public workers."

Act 111 gave firefighters and police collective bargaining with binding interest arbitration, but no right to strike

Recognizing that statistic, and commenting upon it in his article entitled, *The Political and Legal Issues of Binding Arbitration in Government*, D. S.

Chauhan stated, "in the recent strike by public employes in Philadelphia (referring to the 1978 Philadelphia teachers strike), this may have been a hidden cause for dissatisfaction among city employes covered by the 1970 Act."

More than 2.5 million students have been affected by strikes

The Philadelphia strike of 1978 was only one of five strikes that have caused a disruption of the children's education in that city. Statewide since 1970 there have been over 500 strikes among the 501 school districts, with over one-half of the districts having experienced at least one strike and with more than 2,500,000 students having been affected by such strikes. Pennsylvania's school strike record has been the worst in the nation. In recent years the average strike has lasted over 16 classroom days; several have run over 50 classroom days.

Pennsylvania has the unenviable distinction of accounting for *over 25% of all teacher strikes* in the nation during the 1970s.

When Act 195 did arrive, it was fashioned largely by copying from existing models in the private sector of labor negotiations, a factor which has caused problems for the public. The reasons why those problems occurred were understood by many knowledgeable people who testified at the request of the Senate in 1970. **Louis J. Bibri**, of the Pennsylvania Chamber of Commerce testified, in part, as follows:

There are important differences between private and public sector bargaining

"The Pennsylvania State Chamber of Commerce has publicly endorsed the right of public employes to bargain collectively. In giving its endorsement, the State Chamber of Commerce believes that any legislation implementing its policy position must recognize two important principles.

"First, that the exercise of the right must be surrounded by safeguards designed to protect the public. Second, there are important differences between bargaining in the private sector and bargaining in the public sector and these differences should be reflected in any legislation adopted by the State Assembly."

Thomas H. Lane, Deputy Attorney General and the adviser to the Senate State Government Committee, spelled out the consequences of Act 195 almost

as if he had a 'crystal ball.'

"Neither private employers nor private employe organizations have as their primary function, the duty to conduct their affairs in the public interest. Both groups, by their very nature, are geared toward protecting their own self interests. While the public may be affected or involved, it is only by indirection and not as a party with a sufficient interest to be entitled to sit in on the deliberations.

"Certain mechanisms are available to employers and employes in the private sector which permit the parties to acquire somewhat the equality desired.

"Because of the nature of government, however, the mechanisms available in the private sector are not adaptable to the public sector. The balance sought to be obtained in the public sector cannot be accomplished through the use of these mechanisms nor through any other mechanism which has been suggested or promoted.

'Mechanisms available in the private sector are not adaptable to the public sector'

"We must face facts. If we were to permit, for instance, the employes to strike, they would have in their hands the tool with which to dictate terms to public employers. Government must, by and large, provide a continuity of service. If this service is broken, where would the general public go for relief?

"Government is, for all practical purposes, a pure monopoly — no secondary sources are available. Chaos would result. Public pressures for these services would not be placed upon the employe organizations, but upon governmental representatives.

"We must recognize that an imbalance is the necessary result of any collective bargaining statute. By various provisions, this imbalance can be minimized but not eliminated. Which group should the imbalance favor? A group which by its very nature is geared to act in its own interest, or a group which by its very nature is geared to act in the public interest?

"The answer is, of course, self-evident and it is the duty of governmental officers, local or state, to exercise their fiduciary duty properly and act to protect the general public from an erosion of the powers and duties the general public has delegated to them."

Others sang the same tune with slightly different lyrics, in testimony presented in 1970. **Fred M. Heddinger**, PSBA executive director, stated:

'Most public employes have virtually assured job security as the result of law or other conditions'

"Perhaps the outstanding difference between public employment and private employment centers around the strike issue. In private employment, if employes strike against a private employer, only the two parties to such an act are seriously hurt. The employer can always terminate the business, or move the business to another area, or elect to go into another business with different circumstances, or exercise a number of other options. The employe is always confronted with the prospect of possible loss of job as a result of an extended or unfair strike. This is a highly deterrent factor.

"No equivalent set of circumstances exist in public employment. Most public employes have virtually assured job security as the result of law or other conditions. The public employer cannot go out of business, or move to another place of business, or exercise other options available in private employment. Present law already highly favors employe groups.

'Some 18 conditions of employment presently provided in Pennsylvania law would normally be a part of the collective bargaining process in private employment'

"Many conditions of employment of public employes are now spelled out by law. For example: minimum salaries which may be paid to teachers; tenure provisions which guarantee almost complete job protection even for ineffective teachers; mandatory retirement benefits which are reputedly the best in the nation; and mandatory leave benefits are among some 18 conditions of employment presently provided in Pennsylvania law which would normally be a part of the collective bargaining process in private employment."

Notwithstanding all of these warnings, teacher unions were given the right to strike. Now almost 12 years later, after experiencing an average of over 50 strikes per year, legislation has been introduced that calls for binding arbitration as an eventual solution, not in lieu of a strike, but only after a strike has been in progress and an injunction granted. (Historically, injunctions by the courts restraining strikes are not issued unless 30-45 school days have elapsed.) Under

some proposed legislation the judge in the Common Pleas Court in the county where a strike is in progress, *could* order binding arbitration *following* the granting of an injunction requiring teachers to return to the classroom.

DISCUSSION OF THE ISSUE

Who wants binding arbitration?

Ultimately, one has to examine who are the principal players in the political battle to achieve binding arbitration. Who wants binding arbitration and why? In the field of public education, the National Education Association (NEA) is by far the largest of the two major teachers' unions, and the NEA wants binding arbitration.

At the 10th annual conference of the National Public Employer Labor Relations Association held in Las Vegas in March of 1981, **Robert Chanin**, general counsel of the NEA explained why NEA now wants binding arbitration. "NEA as a professional organization and union, spent a great deal of time a decade ago — usually unsuccessfully — trying to win strike rights for teachers. But detractors said teacher strikes should be barred as injurious to the public health and safety, even though NEA argued that teachers were not like police and firefighters and their strikes were not critical.

Teacher unions began to seek binding arbitration as an alternative when schools were kept open during a strike

"Then in the late 1960s and 1970s when the number of teachers' strikes increased substantially, courts began imposing stiff fines and jail sentences on teachers who struck; NEA found out that schools were learning how to keep schools open and "take a strike"; so strikes, as a terminal point to contract disputes, were becoming a "mixed blessing," and NEA began exploring alternatives, including binding arbitration."

Chanin went on to explain that "NEA and other unions no longer believe that the right to strike is the long-range answer to contract disputes and consider binding arbitration as one option among many that brings us into interest arbitration in the context of developing a moving process." With over 30 jurisdictions having enacted some form of binding arbitration for some types of employes, Chanin said, "final offer arbitration — either 'item-by-item' or 'package' — has been developed with the idea of forcing the parties to submit 'reasonable' final offer proposals to an arbitrator who must choose one or the other."

"If the objective is to force the parties to remove

any unreasonable demands, package is preferable, although it has the political disadvantage of making both parties still keep proposals in packages because of pressure from their respective constituencies," Chanin declared. "We're at a crossroads. The present system (of no-strike laws and imposed settlement terms) has proved unworkable and unfair. A strike is always disruptive, sometimes intolerable, and nearly always hurts the employes most. So interest arbitration becomes an answer."

He added, "As a matter of NEA policy, if a state affiliate's goal is a right to strike law, NEA staff works with it to that end, while if another state wanted a 'mixed' approach of the right to strike with an arbitration tie-in, NEA staffers would aid in securing this system."

This is the "Have your cake and eat it too" approach that is now being proposed in Pennsylvania. If allowed to pass, it can only result in creating a greater imbalance in favor of special interest groups.

The 'have your cake and eat it too' approach provides an imbalance for the public interest

Poor public policy

Allowing binding arbitration in lieu of strikes is poor public policy; allowing binding arbitration along with the right to strike to prevent long strikes is extremely poor public policy.

OTHER MAJOR TOPICS

The issue of binding arbitration touches on several major topics ranging from the threshold issue of its constitutionality through the thorny thicket of fiscal responsibility, to the seemingly trivial aspects of how it works, assuming it is legal and will not be too taxing upon local residents.

Like most topics of this magnitude, the various issues overlap and interweave. This portion of the pamphlet will focus on the constitutional and fiscal issues and then consider some of the problems inherent in the binding arbitration procedure in jurisdictions where it has been implemented.

The constitutional issue

The constitutionality of binding arbitration laws has been questioned in several state courts. As mentioned earlier, the state courts in California, Colorado, Utah and South Dakota have declared these laws unconstitutional. The supreme courts in Michigan and Maine were deadlocked on the issue leaving decisions by lower courts that permitted implementation of binding arbitration to remain in effect. Connecticut is still litigating its new law on binding arbitration.

All the states that have declared binding arbitration to be unconstitutional, have held that legislative authority had been improperly delegated to private individuals — arbitrators. The rationale is perhaps best expressed by the Colorado Supreme Court in *Greeley Police Union v. City Council of Greeley* as follows: "A public employer cannot be forced to arbitrate disputes arising from a collective bargaining agreement. A contrary holding, in our view, would seriously conflict with basic tenets of representative government. Fundamental among these tenets is the precept of the officials engaged in government decision-making (for example, setting budget, salaries, and the terms and conditions of public employment) must be accountable to the citizens they represent." Binding arbitration removes these decisions from the authority of the elective representatives, placing that power in the hands of an outside person who has no accountability to the public.

States declaring binding arbitration unconstitutional held that legislative authority was improperly delegated to private individuals — arbitrators

Judge Charles Levin, in writing an opinion for the deadlocked Michigan court, in *Dearborn Firefighters v. City of Dearborn,* concluded that the delegation of power to a panel to decide questions of public policy concerning conditions of employment, level and standard of services, and the necessary allocation of public revenues, was an invalid delegation of legislative authority. Judge Levin observed: "The Act is structured to insulate the arbitrator's/chairman's decision from the political process. It is not intended that he be, nor in fact is he accountable, within the political process for his

decision. This is not consonant with the constitutional exercise in a representative democracy. It is a unique method of appointment requiring independent decision-makers without accountability to a governmental appointing authority and the unique dispersal of decision-making power among numerous ad hoc decision-makers, only temporarily in office, precluding assessment for the consequences of their decision on the level of public service and the allocation of public resources."

The constitutionality of Act 111 of 1968 was generally upheld in the 1969 case of *Harney v. Russo* decided by the Pennsylvania Supreme Court. The municipal employers claimed difficulty in being able to meet an arbitrator's award for higher salaries. Perhaps sensing that issue might be critical in future court cases, the inability of the employer to meet substantial increases in employe salaries and benefits was purposely left unresolved. Given the economic climate of the inflation-ridden 1980s and all that has transpired between 1969 and 1980, the courts may well be in a position of limiting awards, if the issue were to be raised again in the appropriate fact situation.

Although several states have wrestled with both state and federal constitutional issues, none of the cases has gone to the United States Supreme Court

Another point to consider is the fact that although several states have wrestled with both state and federal constitutional issues, none of the cases has gone to the United States Supreme Court, for an ultimate decision. Obviously, no one can predict with any certainty what the outcome of such litigation would be. The fact that several states have upheld the constitutionality of binding arbitration is not judicially persuasive given the fact that many of those cases were decided on narrow grounds with emphasis on local and state ordinances and statutes rather than an in-depth, scholarly treatment of the federal constitutional questions.

Ultimately, the public of the United States may not have to wait to have this issue decided by the United States Supreme Court. The taxpaying public is becoming increasingly aware of the soaring costs of paying for public services. Where local resources are simply not adequate to raise the funds needed to satisfy an award by an arbitrator, the only recourse

'It has not worked, will not work and very possibly could bankrupt the very cities it was established to serve'

available to the local governing body is to request the state Legislature to appropriate more money of public expenditures. If such an appropriation is denied, there will obviously be a necessity to reduce the level of services.

Even **Arvid Anderson**, chairman of the Office of Collective Bargaining of the city of New York, in his February 1980 address to the Labor Law Section of the American Bar Association, acknowledged that we may not have to wait for a Supreme Court decision. Anderson, who is an avowed advocate of the binding arbitration process, in speaking of statutes that have been drafted that have survived court challenges on a constitutional grounds, stated, "If arbitration in practice fails to provide a reasonable alternative to the strike, then the process will not survive. That will be a political rather than a legal decision."

Mayor Young of Detroit put it even more bluntly. Speaking of the Michigan experience of binding arbitration for police and firefighters, Young said, "It has not worked, will not work and very possibly could bankrupt the very cities it was established to serve."

Fiscal ramifications

Closer to home, a Pittsburgh judge, **Silvestri Silvestri**, commenting on hearings in his courtroom involving bus fares and the Port Authority on Transportation (PAT), described the union work rules gained through the arbitration process as "totally incredible."

A community group wanted Silvestri to roll back PAT's latest fare hike bringing basic fares back to 60 cents and to force PAT to be more efficient by eliminating some routes. During the hearings, **Harold Norris**, PAT's rates and service director, testified:

"The union contract limits management's authority to shift drivers' hours. The rules also require that drivers be paid for eight hours, even if there is no bus to drive."

Silvestri told PAT executives clustered in his courtroom, "In effect, what we're doing is subsidizing a labor organization. How'd you let yourself get into a trap like that? In effect, you've created a (bus) system solely for the bus operators." Judge Silvestri continued, "If that's the situation, I'm not so sure we shouldn't dismantle the whole Port Authority and start all over again."

A Pittsburgh judge described the union work rules gained through the arbitration process as 'totally incredible'

Bus drivers earn more than $10 an hour, and labor costs eat up about 80% of PAT's budget.

The arbitrator who provides pay raises does not have to hang around to make the hard choices and suffer the criticism of how to balance a capped budget. D. S. Chauhan commented in his article, "The fiscal impact of compulsory arbitration will be felt more at the local level where governments are already experiencing financial hardship." Chauhan was undoubtedly making a thinly veiled reference to capped budgets.

Capped budgets gained national attention rather dramatically in California several years ago with its Proposition 13. Proposition 13, as most of the public knows, was the first recent attempt by an individual state to limit the growth of state and local budgets.

Faced with no growth or "roll-back" (lesser) revenue sources, municipal governments hit by the problem of runaway inflation had no alternative but

to cut back on personnel and programs.

In Massachusetts the people voted to repeal the binding arbitration law for police and firefighters

The concept has variously been described as "putting a cap on spending," or "putting a freeze on inflation." Whatever it is called, its immediate consequences are likely to be a reduction in force and services.

Similar legislation has been considered in at least 29 states with as many as 12 implementing restrictions of some type. This type of restraint on state and local governmental entities creates a dilemma for administrators in how to meet increased demands for public services when a "cap" or "freeze" is placed on their ability to spend money and/or raise revenue. The $64 question in states that have both binding arbitration and a capped budget becomes how to honor an arbitrator's award for more money than is in the budget.

In 1979 the compulsory arbitration law came under fire in Massachusetts where **Governor Michael Dukakis** vetoed an extension of the law which permitted binding arbitration for police and firefighters stating that "the law made normal collective bargaining irrelevant." However, the governor's veto was over-ridden by the Legislature.

An arbitration award can seriously undermine the fiscal and policy-making role of a legislative body, and deny the public any real way of redress

It should come as no surprise to anyone that the voice of the people is not as loud as the voices of special interest groups in the halls of any Legislature. But lobbying tends to take a back seat to the voting process and unquestionably those Massachusetts legislators got the message from the people at the ballot box, when in the general elections of November 1980, by public referendum, the people voted to repeal the binding arbitration law for police and firefighters, proving once again that the secret ballot is something special interest groups find most difficult to control.

These incidents only underscore the major issue which is now being recognized by more and more legislators. An arbitration award can seriously undermine the fiscal and policy-making role of a legislative body, and deny the public any real way of redress.

Binding arbitration is not a cure-all

Assuming that this information regarding the constitutionality of binding arbitration and its adverse economic consequences is not persuasive enough, an examination of the problems inherent in the process should illustrate that binding arbitration is not a cure-all, or panacea, to preventing prolonged strikes, or resolving impasses.

Binding arbitration often appears to be a quick, clean and easy answer to the problem, but...

First, it might be helpful to have a broad overview of how an impasse or a stalemate is resolved without resorting to binding arbitration as a solution. Negotiations in its simplest form in the public sector involves arms length and good faith bargaining between the parties for some specified period of time. Assuming a contract has not been agreed upon by the parties, at the end of that period of time they may resort to fact-finding or the services of a professional mediator. A strike (legal or illegal depending on the state) may happen next. Eventual resolution of the labor dispute and a new contract between the parties will eventually occur when public pressure forces one side or the other to "cave-in" or forces both sides to compromise their respective positions.

Thus the stalemate, or deadlock, (including the strike if one has occurred) will be resolved. The key is public pressure. In its simplest form the public sides with one side (the cost conscious school board) or the other side (the teachers or other employes) who want more wages than the good faith bargaining process has yielded.

In theory, the majority of the people prevail, which is the very essence of democracy.

To some people however, that democratic process is too vigorous, too vocal, perhaps too democratic. They would prefer a seemingly quicker, cleaner resolution of the process. Enter binding arbitration which on the surface appears to be quick and clean.

Exactly what is binding arbitration and how does it work? To paraphrase a **Robert Browning** poem, "How shall I describe thee? Let me count the ways." The answer, simply put, is that there are 30 or

more different ways among the 30 or more state and local jurisdictions that have enacted binding arbitration. Some are compulsory, some are not. Some are in lieu of strike, some are in addition to the right to strike. Most pertain only to firefighters and/or police officers. Only four states have binding arbitration for teachers.

In some states arbitration follows fact-finding and/or mediation. In some states, neither process is used. Some have methods called last-best-offer — two types of which are easily distinguishable, "best-package" and "item-by-item." Some states offer a smorgasbord of options from among the many solutions suggested in its statutes.

Arbitration as provided or required by statute can be reduced to a manageable list of four categories

Arbitration as provided or required by statute can, however, be reduced to a manageable list of four categories.

ONE: VOLUNTARY BINDING ARBITRATION

At any time both parties to the negotiation process feel helplessly deadlocked, they agree to allow one or more presumably impartial parties to resolve the matter(s) in conflict. Both agree to be bound by that decision.

TWO: COMPULSORY BINDING ARBITRATION

By statute, if the parties have not agreed to a new contract by some prescribed time, the matter(s) must be submitted to an individual arbitrator, or a panel usually consisting of three arbitrators.

THREE: LAST BEST PACKAGE OFFER

Either voluntarily, or under the compulsion of some statute, the parties submit to the arbitrator their respective positions as a total package as a deadlock occurs, or when timelines of the bargaining period expire. The arbitrator selects one package or the other. There is no "splitting the difference," nor any "one-for-you, one-for-them" approach in an attempt to appease both sides.

FOUR: LAST BEST OFFER ON AN ITEM-BY-ITEM BASIS

Unlike the package approach, this method, as the title suggests, allows the person selected as arbitrator to resolve the impasse, by considering each issue in the package separately.

Problems inherent in the process

The following is a list of some of the problems that have plagued those jurisdictions where the state Legislature has implemented binding arbitration.

Arbitrators often fail to detail reasons to justify their decisions

• There is often a lack of factual, credible, economic data from which the arbitrator can make an intelligent, informed decision. Furthermore, the process often encourages one or both sides to withhold available data, especially in last-best-offer procedures, for fear that some of the data may be misconstrued and/or used against them.

• Arbitrators often fail to detail reasons and to provide data, if available, and sources to justify their decisions.

In some jurisdictions, such as Pennsylvania, such detail is not required by statute. In jurisdictions, where it is required, such judicial analysis tends to be foreign to an arbitrator's training. Consequently, at best, lip service is rendered to satisfy the requirement.

• Who decides what issues are being bargained before arrival of an arbitrator and what issues must be legally considered? Arbitrators often have a difficult time deciding what items must legally be bargained. What constitutes conditions of employment is unquestionably a gray area.

Frequently, the parties cannot agree on exactly what the other had on the table as its last-best-offer when the impasse arose

• What does the arbitrator do when two lists of unresolved items are submitted by the two parties and the lists don't match? How is the arbitrator to decide what issues were, or were not, on the bargaining table when the impasse occurred? Frequently, according to many articles on the subject, when an arbitrator is summoned, the parties cannot agree on exactly what the other had on the table as its last-best-offer when the impasse arose.

• Arbitration discourages good faith negotiations which often result in submission of dozens, if not hundreds of items that one side or the other, or both, would like the arbitrator to resolve. In one of the few instances in Pennsylvania where a school district *voluntarily submitted to binding interest arbitration,* the union submitted over 90 items for

consideration. The district maintained the vast majority of those were not subject to bargaining under Act 195, but to no avail, as the arbitrator ruled on almost all of the union requests in a manner most favorable to the union.

There is a 'narcotic' effect as one or both sides might reason to let the arbitrator decide everything

• The procedure tends to take longer, cost more, and consequently postpones implementations of awards.

• There is a serious shortage of qualified and experienced arbitrators, both within government ranks and in the private sector.

• There is a "narcotic" or "chilling" effect which can lead to total abdication of responsibilities normally inherent on both the union and management sides, as one or both sides might reason — "why waste our time negotiating — let the arbitrator decide everything."

• How final is "final and binding arbitration," especially if strikes still occur? Implicit in the concept of binding arbitration is the fact that the result is final and binding upon both parties, regardless of whether the process is compulsory by legislation, or voluntary by the parties. However, the more one examines the case histories in states that have had some form of binding arbitration, the more one must ask the question, "How final is final?"

For example, a school board in Maine alleging that it did not have the resources to pay for an award rendered under binding arbitration, petitioned the state supreme court. Although petition for termination of the entire award was denied, the award was modified by the Maine Supreme Court. In the meantime no payments were made, lest the school board be faced with the problem of having to collect overpayments.

How final is 'final and binding arbitration,' especially if strikes still occur?

The phenomenon of lack of finality until the judicial and/or legislative review procedures have been exhausted was commented upon by **Robert Helsby**, director of New York State's Public Employment Relations Services at the 1980 conference on public sector relations. He stated, "The courts are extending a broader review." He pointed to a recent case in Minnesota where the arbitrator allowed an 18% pay raise over two years, but the

state Legislature lowered the pay raise to 14% to conform with **President Carter's** 7% annual price wage guidelines. "A lower court upheld the 18% arbitrator's finding," he said. "On appeal, however, the state supreme court overruled the lower court's decision and judged that the pay raises should remain within the price wage guidelines of 14% for the two-year period." That there will be significant challenges to any binding arbitration award is inherent in the process.

Binding arbitration invites court challenges of the arbitrator's decision

And virtually every jurisdiction has been confronted with such challenges. For instance, in *Milwaukee County v. Milwaukee County Deputy Sheriff's Association*, the court agreed with the county in its appeal wherein the county contended that the arbitrator extended his powers and executed them in such a manner that a mutual, final and definitive award of the subject matter was not accomplished. Likewise, in the case of *Caso v. Cofjee*, the New York Court of Appeals was confronted with the question pertaining to the manner and scope of judicial review for awards made by public arbitration panels. The court concluded that final arbitration awards are to be treated as quasi-judicial and quasi-legislative for the purpose of review. That decision, perhaps to avoid a separation of powers issue, in effect, created a duplication of powers concept!

Binding arbitration in public education

Only four jurisdictions have some type of binding arbitration for public school systems

Only four jurisdictions have some type of binding arbitration for public school systems. Wisconsin adopted a compulsory interest arbitration statute effective January 1, 1978 which covers all municipal employes including county and school district employes. This statute requires the arbitrator to select the single final offer, i.e., "package" of one of the parties on all issues of the dispute.

Connecticut passed a similar law which took effect October 1, 1979 providing for final offer arbitration. The dispute between the teachers organization and the school board can be submitted to a single arbitrator or a tripartite panel, according to agreement of the parties. If the parties fail to agree to an arbitrator or arbitrators, three arbitrators are appointed from a panel maintained by the Connecticut Department of Education. Each individual issue in dispute is submitted in the form of a last-best-offer.

Iowa has perhaps the most comprehensive public sector binding arbitration law. A final offer procedure is used and those final offers are submitted to a tripartite panel which rules on each impasse item following a fact-finders report.

In Minnesota there is an interest arbitration statute for item-by-item arbitration for "essential employes." That definition involves supervisory employes, confidential employes, school principals and assistant principals.

Current status in Pennsylvania

Act 195 was passed in 1970. It has withstood virtually every attempt to modify it by legislative change, notwithstanding the Jones Commission Study Report, published in June 1978. The only "changes," if any, that have been wrought, have been through judicial interpretation. Those interpretations have frequently had to grapple with attempts to reconcile procedures under Act 195 with the substance of the School Code, another body of law that regulates the operation of the public schools.

For example, by suggesting that the School Code requires a minimum of 180 days of actual instruction, regardless of interruptions in the traditional school calendar, teachers can strike as allowed by Act 195 with impunity for 30-45 days without fear of losing any pay because the calendar has to be revised to provide for 180 days of instruction; hence 180 days for pay. As a result, there have been some very vicious strikes and some very lengthy strikes causing disruption in educational services. These disruptions often cause bitter feelings in the schools and in the local community. During the 1980-81 school year, for example, the Neshaminy School District had a 54-day work stoppage. Steel Valley experienced a 45-day strike, after which an injunction was issued. The injunction was ignored by the local teachers' union and no fines were levied. A total of 51 student days were consumed by the strike.

Act 195 has withstood virtually every attempt to modify it by legislative change

In both instances public pressure led to judicial intervention. Although judges have no right by law under Act 195 to become involved in anything more than granting or denying a back-to-work request, the personal efforts of the two judges along with mounting public pressure led to eventual settlements.

CONCLUSION

Binding arbitration is not a strike preventer

Binding arbitration is often thought of as a device that will prevent strikes. In most states that have collective bargaining and binding arbitration as a method of impasse resolution, there is no right to strike. Yet strikes occur anyway.

Raymond Perry, administrative assistant to the president of International Association of Firefighters (IAFF), in speaking before the fifth annual conference of public sector relations held in 1980, stated, "Fact No. 1 is that there was a time when firefighters didn't strike. A firefighters' strike meant automatic expulsion from the IAFF. Fact No. 2 is that the police used not to strike. **Calvin Coolidge** is remembered for breaking up the 1919 police strike in Boston (while Massachusetts' governor), but not for being a great president. Fact No. 3 is that police and firefighters do strike."

Commenting on what is likely to happen during the 1980s at the same conference, **Gary Long**, personnel director of Eugene, Oregon, and president of the National Public Employer Labor Relations Association predicted that *"public employe strikes with or without compulsory interest arbitration should continue to rise although unions will press arbitration laws for other than uniformed services."* Long is in a particularly unique position to comment. His city was the first jurisdiction to use last-best-offer binding arbitration in 1971. At the same conference **President Robert Coulson** of the American Arbitrators Association also predicted more strikes and layoffs for the 1980s stating, "We have come to realize that the iron laws of economics are as applicable to the municipalities as they are to the factories."

'We have come to realize that the iron laws of economics are as applicable to the municipalities as they are to the factories'

Despite the history of strikes in jurisdictions which allow binding arbitration and forbid strikes, and despite the predictions of more strikes in the 1980s, current legislative proposals in Pennsylvania would not take away the union's strike power. They would add another arrow to the quiver, in the form of binding arbitration; presumably not to eliminate

strikes or make them illegal, but simply to prevent strikes from going on too long. How long is too long? Presumably, not beyond the time when teachers would be able to work 180 days under a revised school calendar in order to make up lost pay.

As stated before, allowing binding arbitration in lieu of strikes is poor public policy; allowing binding arbitration along with the right to strike to prevent long strikes is extremely poor public policy.

Allowing binding arbitration along with the right to strike to prevent long strikes is extremely poor public policy

Allowing binding arbitration would only aggravate the present imbalance in public sector negotiations which already favors the special interest groups, rather than the public, through its locally elected officials.